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 HOUTAN PETROLEUM, INC.

**UNITED STATES DISTRICT COURT IN AND FOR  
 THE NORTHERN DISTRICT OF CALIFORNIA**

HOUTAN PETROLEUM, INC.	)	CASE NO. 07-CV-5627 SC
	)	
Plaintiff,	)	
vs.	)	PLAINTIFF, HOUTAN PETROLEUM, INC.'S,
	)	OPPOSITION TO CONOCOPHILLIPS
	)	COMPANY'S MOTION IN LIMINE NO. 2
CONOCOPHILLIPS COMPANY, a Texas	)	
Corporation and DOES 1 through 10,	)	RE: EXCLUSION OF EVIDENCE THAT
Inclusive	)	CONOCOPHILLIPS' OFFER TO SELL ITS
	)	EQUIPMENT AND IMPROVEMENTS TO
Defendants.	)	HOUTAN PETROLEUM WAS NOT BONA
	)	FIDE
	)	

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Plaintiff and Counter-Defendant, Houtan Petroleum, Inc. ("Houtan Petroleum"), hereby opposes Motion In Limine No. 2, filed by Defendant and Counter-Plaintiff, ConocoPhillips Company ("ConocoPhillips") as follows:

ConocoPhillips has filed its Motion in Limine No. 2 seeking an order excluding evidence that ConocoPhillips' offer to sell its equipment and improvements to Houtan Petroleum was not bona fide under the PMPA.

Plaintiff opposes such Motion on the grounds that it is ConocoPhillips, rather than HoutanPetroleum's, burden to prove that its offer to sell its equipment and improvements to Houtan Petroleum was bona fide under the PMPA, which has not been conclusively decided as a factual matter.

ConocoPhillips' motion is based on the argument that Houtan Petroleum's request for such

1 an offer was made more than 30 days after ConocoPhillips' Notice of Termination to Houtan  
2 Petroleum under section 2804 of the PMPA. ConocoPhillips contention is incorrect for two reasons.

3 First, ConocoPhillips' argument is moot in light of the fact that it did, in fact, tender to Houtan  
4 Petroleum an offer on October 22, 2007 that explicitly indicates that it is an "OFFER TO SELL  
5 IMPROVEMENTS" along with a Bill of Sale for \$340,000.00, also allegedly "[i]n accordance with  
6 the provisions of the Petroleum Marketing Practices Act, 15 U.S.C. Section 2801 et seq." (See,  
7 Haddad Decl., Docket No. 5, Exh. "E," p. 000157). On September 18, 2007, ConocoPhillips sent  
8 Plaintiff a notice, entitled "NOTICE OF TERMINATION" indicating:

9 ConocoPhillips Company ("CONOCOPHILLIPS"), **pursuant to the requirements**  
10 **of the Petroleum Marketing Practices Act ("PMPA") provides you with this**  
11 **written notice** that your franchise relationship with CONOCOPHILLIPS and the  
above referenced Agreement shall terminate at 12:00 noon on October 31, 2007  
("Termination Date").

12 The reason for the termination is that the Station you operate is leased to  
13 CONOCOPHILLIPS by a third party, and said lease shall expire on October 31, 2007.  
14 The existence of an underlying lease was fully disclosed to you. Termination of the  
franchise relationship as a result of the loss of the franchisor's right to grant  
15 possession of the lease marketing premises because of the expiration of an underlying  
lease is an event that is of material significance to the franchise relationship for which  
16 termination is reasonable... Enclosed with this Notice is a copy of the Department of  
Energy revised Summary Of Title I of the PMPA, **which we are required by the**  
17 **PMPA** to provide you... (Haddad Decl. in support of Houtan Petroleum's Application  
for Temporary Restraining Order and Preliminary Injunction, Docket No. 5, Exh. "B,"  
p. 000082-83, emphasis added).

18 Thus, ConocoPhillips' own Notice of Termination acknowledges the fact that it was required  
19 to provide such notice "by the PMPA." Although Houtan disputes the timeliness of this Notice, there  
20 is no dispute that ConocoPhillips' reference to the PMPA in the Notice pertains to the notice  
21 requirement under Section 2804(a).

22 Within 30 days of such Notice of Termination, on October 18, 2007, Plaintiff notified  
23 ConocoPhillips in writing that it will be acquiring possession of the premises from the landlord and  
24 demanded that ConocoPhillips forward a bona fide offer to sell its equipment and improvements.  
25 (Haddad Decl., Docket No. 5, Exh. "D," p. 000155).

26 On October 22, 2007, ConocoPhillips sent Plaintiff a document entitled "OFFER TO SELL  
27 IMPROVEMENTS" along with a Bill of Sale for \$340,000.00 which in relevant part provides in  
28 substantial part as follows:

1 By hand delivered letter on September 18, 2007, **you were notified** of the Notice of  
 2 Termination (“Notice”) of the Union 76 Dealer Station Lease and Motor Fuel Supply  
 3 Agreement, with an effective date of September 1, 2007, , 2007 (“Agreement”),  
 4 **which Notice terminates your franchise relationship with CONOCOPHILLIPS**  
**COMPANY**, a Delaware corporation (“COP”) for the above referenced Station. The  
 termination of the Agreement shall be effective 12:00 noon on October 31, 2007  
 (“Termination Date”).

5 The reason for the termination is that, despite COP’s efforts to get additional tenancy  
 6 at the Station you operate, the underlying ground lease between COP the third party  
 7 landlord shall expire on October 31, 2007. The duration of the lease and the fact it  
 8 **might expire** during the term of the franchise were disclosed to you. Under these  
 facts, it would not have been reasonable for COP to furnish not less than 90 days  
 notice.

9 You have informed COP on October 18, 2007 that you have obtained a lease with the  
 10 third party landlord for the Station and have requested from COP a bona fide offer to  
 purchase the improvements and equipment at the Station.

11 **In accordance with the provisions of the Petroleum Marketing Practices Act, 15**  
**U.S.C. Section 2801 et seq.**, COP offers to sell you our interest in the improvements  
 12 and equipment located on the marketing premises... (See, Haddad Decl., Docket No.  
 5, Exh. “E,” p. 000157, emphasis added).

13 Thus, ConocoPhillips acknowledged once again the fact that the September 18, 2007 Notice  
 14 of Termination was issued pursuant to Section 2804(a) as the Notice that “terminates [Plaintiff’s]  
 15 franchise relationship with CONOCOPHILLIPS COMPANY.” With this Offer to Sell Improvements  
 16 ConocoPhillips also acknowledged in no uncertain terms the fact that such Offer was made “[i]n  
 17 accordance with the provisions of the Petroleum Marketing Practices Act, 15 U.S.C. Section 2801  
 18 et seq.”

19 Additionally, ConocoPhillips expressed this waiver several times in correspondence to the  
 20 landlord for the property. For example, on September 17, 2007, ConocoPhillips’ real estate manager,  
 21 Richard L. Mathews wrote:

22 I am still hopeful that ConocoPhillips (“COP”) might still have an opportunity to  
 23 secure a long-term lease with you for the above-referenced location. **Since there has**  
**been no response since your brief letter dated May 24<sup>th</sup>, 2007, however, I**  
 24 **appreciate this might not be possible.** Please understand that we are still interested  
 if you are willing to discuss this issue with COP.

25 **In the meantime, there are notice obligations we must make to our franchise**  
**dealer that make it necessary for us to request a short-term extension.** To this  
 26 end, this letter serves as a formal request to extend the expiration date to the ground  
 lease for a period of **ninety (90) days**, under the same terms and conditions. If you  
 27 concur, the revised expiration date will be January 31, 2008.

28 In addition, I would like to also request that the period by which we must raze all

improvements following the terms of the lease be extended from 10 days to 30 days.

**Timing is of the essence**, so may we please have your response to our **90-day** extension request by **September 21, 2007**? (emphasis in original) Should I not hear from you by September 21<sup>st</sup>, I will take your silence as your unwillingness to extend the lease as requested. (Bleau Decl., Docket No. 61, Exh. "D," p. COP 00132, emphasis added except where indicated).

Thus, ConocoPhillips has expressly waived any argument that it was not required to make the offer that it has already made or that such offer need not have complied with the *bona fide* requirement of the PMPA. Moreover, after expressly stating that such offer is in compliance with and made pursuant to the PMPA, for ConocoPhillips to now contend that such offer did not need to comply with the PMPA and that it was not required to make it in the first place is a bad faith act in and of itself and disingenuous.

Second, in making its argument ConocoPhillips assumes that the disclosure contained in the subject franchise agreement is what triggered Houtan Petroleum's obligation to request a bona fide offer from ConocoPhillips. This, however, is not the case.

The Court also recognized that "[i]t is settled law that a bona fide offer under the PMPA is measured by an objective market standard.'... 'To be objectively reasonable, an offer must approach fair market value'... '[t]he facts of each case will set the terms of what constitutes a bona fide offer.'" (November 16, 2007 Order, 13:13-27 (quoting, *Ellis, supra* at 787 & 788 and *Slatky v. Amoco Oil Co.*, 830 F.2d 476, 485 (9<sup>th</sup> Cir. 1987)).

The Court ultimately held:

The Court cannot conclude from the evidence before it whether the price contained in the offer by Conoco was bona fide. That said, the parties' disagreement as to the value of the equipment and improvements is not grounds for a preliminary injunction. Thus, the issue that remains in this action is whether the price contained in the offer was reasonable, and, therefore, whether the offer was bona fide. **This is a factual dispute and, as such, is a question for the jury.** (November 16, 2007 Order, Docket No. 18, 14:9-16, emphasis added).

In denying Plaintiff's application for a preliminary injunction, the Court emphasized as follows:

The Court emphasizes that in reaching these conclusions regarding the offer, the Court does not hold that the offer was necessarily reasonable. Instead, the Court finds that the issue of the offer is not, by itself, sufficient justification for a preliminary injunction. (November 16, 2007 Order, Docket No. 18, 16:3-7).

1           Additionally, The express language of the PMPA §2802(c)(4)(C) provides that in a situation  
 2       where the franchisor loses the underlying lease, a termination of a franchise relationship is not  
 3       effective until,

4           in a situation in which the franchisee acquires possession of the leased marketing premises  
 5       effective immediately **after the loss of the right of the franchisor to grant possession**  
 6       (through an assignment [of an option to extend the underlying lease] pursuant to subparagraph  
 7       (B) or by obtaining a new lease or purchasing the marketing premises from the landowner),  
 8       the franchisor (if requested in writing by the franchisee not later than 30 days after notification  
       was given pursuant to section 2804 of this title), during the 90 - day period after notification  
       was given pursuant to section 2804 of this title – (i) made a bona fide offer to sell,  
       transfer, or assign to the franchisee the interest of the franchisor in any improvements or  
       equipment located on the premises...” 15 U.S.C. §2802(c)(4)(C).

9           Case law supports Plaintiff’s position that Plaintiff need not request the sale of improvements  
 10       and equipment until 30 days after he “acquires possession of the leased marketing premises effective  
 11       immediately **after** the loss of the right of the franchisor to grant possession.”

12           In *Hazara Enterprises, Inc. v. Motiva Enterprises, LLC* 126 F.Supp.2d 1365 (2000), Motiva  
 13       voluntarily terminated the underlying ground lease with the landlord, Kathleen Erskine Leutze,  
 14       effective November 30, 1999 pursuant to a lease term authorizing cancellation upon 180 days notice.  
 15       On April 8, 1999, Motiva advised its lessee dealer, Hazara Enterprises, Inc., that it did not intend to  
 16       renew its franchise agreement effective November 30, 1999. Hazara thereafter attempted to negotiate  
 17       a new lease directly from the landowner, but was unable to accomplish this until November 20, 1999,  
 18       when it executed a new lease with the landlord. Shortly after Hazara Enterprises, Inc. regained its  
 19       right of possession of the marketing premises on December 13, 1999, Hazara asked Motiva to sell  
 20       the underground fuel lines and storage tanks to it. After an evidentiary hearing, the Magistrate Judge  
 21       found the underground storage tank system at Hazara’s station to be “potentially dangerous” and  
 22       recommended to grant the injunctive relief. *Id.* at 1367-1369.

23           The Court held, however, that there was “at least an issue of fact as to the timeliness of  
 24       Hazara’s request to purchase the equipment because, as Hazara points out, it did not obtain a new  
 25       lease on the marketing premises at the same time it was notified of the termination of the franchise  
 26       relationship (April of 1999), raising a query as to whether it acquired possession of the premises  
 27       “effective immediately after the loss of the right of the franchisor to grant possession” within the  
 28       meaning of section 2802(c)(4)(C) on November 29, 1999, triggering the 30 day notification request

1 provision of the statute at that time.” *Id.* at 1373. The Court went on to say, however, that this issue  
2 of timeliness was a moot point at this juncture in light of the prior finding regarding the potential  
3 dangerousness of the equipment. *Id.* Nevertheless, the *Hazara Enterprises, Inc.* Court recognized  
4 that the time to request the sale of improvements and equipment under section 2802(c)(4)(C) did not  
5 expire until after Plaintiff obtain the possession of the property, immediately upon the franchisor’s  
6 loss of the right to grant possession.

7 Such an interpretation is certainly consistent with the overriding purpose of the PMPA. In  
8 a situation such as the one at bar, the PMPA sets forth a requirement that the franchisee make a  
9 request to purchase the equipment and improvements within a specified time frame after it gains  
10 possession of the property, “effective immediately” after the franchisor’s loss of the right to grant  
11 same.

12 The situation that exists in the present case is even stronger in Plaintiff’s favor than the one  
13 that existed in the *Hazara Enterprises, Inc.* case. In the present case, there is no question that  
14 Plaintiff obtained possession of the premises immediately upon ConocoPhillips’ loss of its right to  
15 grant possession to Plaintiff. Its only purpose in remaining on the premises is to continue operating  
16 a motor fuel service station.

17 Moreover, in situations where a third party lease is not due to expire at some point in the  
18 future, it would not make any sense to require a franchisee to request an offer for the sale of  
19 improvements and equipment from the franchisor, within 30 days after having just entered into a  
20 franchise agreement. To so hold, would also mean that the franchisor would be required to make  
21 such offer “during the 90-day period after notification was given” and to hold such offer open “for  
22 at least 45 days” even though the effective date of termination may not come for months or years to  
23 come, depending on the expiration of the underlying lease. See, 15 U.S.C. §2802(c)(4)(C) and  
24 §2802(c)(4)(C)(ii). So, hypothetically, to accept ConocoPhillips’ argument would mean that in a  
25 situation where the underlying lease is not due to expire for a year, the franchisee would have to  
26 request an offer within 30 days after having just entered into the franchise and the franchisor would  
27 have to make an offer within 90 days after that, before anyone could possibly know whether the  
28 underlying lease would be renewed and before the franchisee could possibly have obtained the right



1 to possession of the premises following the expiration of the franchise. Such a scenario simply would  
 2 not make any sense. Rather, as explained above, the more logical and viable interpretation of the  
 3 PMPA is that the 30 day demand for an offer need not be made until after the franchisee, acquires its  
 4 right to possession from the third party landlord.

5 Finally, in deciding the issues in this case, the Court should do so in the context of the  
 6 overriding purpose of the PMPA. In *Doeberiner v. Sohio Oil Company*, 880 F.2d 329, 331-332 (11  
 7 Cir. 1989), the Court set forth the purpose behind the PMPA:

8 The legislative history of the PMPA reveals that the Act was  
 9 designed to protect franchisees from arbitrary or discriminatory  
 10 termination or non-renewal. (Citation omitted.) Congress sought to equalize  
 11 the obvious disparity in bargaining power between major oil companies and  
 12 service station operators. (Citations omitted.) ... To attain these ... goals,  
 Congress specifically set forth the permissible grounds for termination or non-  
 renewal of franchise relationships, and bestowed on federal courts jurisdiction  
 to remedy violations of the Act. *Id.*

13 This case is precisely the type of case which Congress had in mind when it enacted the PMPA.  
 14 The PMPA is intended to protect gas station franchise owners from arbitrary and discriminatory  
 15 termination of their franchises with large oil corporations and gasoline distributors, and to remedy the  
 16 disparity in bargaining power between the parties to gasoline franchise contracts. *DuFresne's Auto*  
 17 *Service, Inc. v. Shell Oil Company*, 992 F.2d 920, 925 (9<sup>th</sup> Cir. 1993) and *Mobil Oil Corporation v.*  
 18 *Virginia Gasoline Marketers and Automotive Repair Association*, 34 F.3d 220, 223 (4<sup>th</sup> Cir. 1994).

19 Based upon the foregoing, Houtan Petroleum respectfully requests that the Court deny of  
 20 ConocoPhillips' motion in limine.

21 Respectfully submitted,

22 Dated: February 4, 2008

BLEAU / FOX, A P.L.C.

//s//

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